LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 30 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHAM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT KARCHMER'S REPLY BRIEF

HERMAN E. COOPER
Attorney for Respondent
Leon Karchmer
500 Fifth Avenue,
New York, New York 10036

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
1—The Court of Appeals correctly decided that the trustees, including Karchmer, were free of wilful misconduct by foregoing restitution proceeding upon the legally unenforceable claim for the 1966 Brauch pension payment	5
Conclusion	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHAM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT KARCHMER'S REPLY BRIEF

Preliminary Statement

This brief for defendant-trustee Leon Karchmer is directed to the only issue applicable to him as raised by "Question 6" of plaintiffs-respondents' Cross-Petition.*

* Brief of Respondents and Cross-Petitioners, p. 15.

Plaintiffs thereby seek to impose personal liability on the trustees for refraining from restitution proceedings upon a legally unenforceable claim against an innocent recipient of a good faith pension payment.

We submit that the cause expressed by the particular question presented for review does not warrant review on certiorari under Rule 19 of the Supreme Court Rules. There are here no conflicting Court of Appeals decisions, no important or novel questions of federal law or of substance, no special and important reasons for grant of certiorari. However, we are responding in what may be an excess of caution.

Plaintiffs seek a Writ of Certiorari for challenge of affirmance by the Court of Appeals of the District Court decision which totally exonerated Karchmer from any personal liability as one of three trustees of the NMU Officers Pension Fund (A35).

Such general absolution explicitly applied to the particular pension payment to Irving Brauch, the only recipient referred to in plaintiffs' formulation of the issue. Neither the trustees nor Brauch were found culpable for the payment. Nevertheless, plaintiffs contend that the trustees breached their fiduciary duties in not pursuing restitution, and ruefully complain that: "Neither of the courts below spoke on this issue".** As will appear, such *sub silentio* response to a non-issue was amply merited.

Plaintiffs first surfaced the present issue before the Court of Appeals (A35). At best, the question of trustee liability for not seeking restitution is hypothetical and depends on the primary determination that the recipient was legally obliged to make restitution. The District Court specifically found an insufficiency of proof to sustain trustee liability for the Brauch payment, and dismissed against

---

** Brief of Respondents and Cross-Petitioners, p. 15.

the trustees for such prior payments to all non-officers except William Perry, a named defendant (A17).

Having been so cleared, the trustees were not chargeable with the duty to seek restitution except against Perry, individually adjudged to be a non-entitled pension recipient. 336 F. Supp. 1107. Judgment was entered on February 18, 1972 in favor of the NMU Officers Pension Plan against Perry for $263,307 (SA89). The trustees did proceed against Perry for restitution on this judgment.

The right and duty of the trustees to seek restitution against Brauch required his similar joinder as a defendant and similar entry of a personal money judgment. They had no equal duty or power to proceed against Brauch or any other non-party recipients of pension payments made and received in good faith under the state of facts and law then prevailing.

Unlike Brauch, Perry, as a named defendant, appeared and was represented by various counsel, who participated actively on his behalf in all stages of the litigation. Brauch was not named, had no notice of potential liability, did not appear, was not represented and was thereby denied a defense by plaintiffs' conscious choice or unexplained oversight. The District Court partial judgment of February 18, 1972 which invalidated pension payments made under the 1961 and 1964 amendments to the Trust Agreement was not *res adjudicata* as to Brauch, a non-party.

The situation involving liability for recouping the payment to Brauch presents both a different set of facts and a different proposition of law than applies to Perry. Brauch was included as a participant in the Officers Pension Plan by reason of the 1961 amendment to the Trust Agreement. He received his pension payment on April 16, 1966. This occurred before there was any intimation or notice of challenge to its propriety, unlike the case with Perry who was paid after such notice (351 F. Supp. 775,

784). It was not until January 11, 1972 that the amendment was first judicially declared invalid and that subsequent payments thereunder by the trustees to non-elected officers were enjoined.

The New York Statute of Limitations on possible recovery against Brauch ran out on April 6, 1972. Any issue of prior trustee duty to sue Brauch depended upon his pension payment having been made in breach of a fiduciary duty as an act of "wilful misconduct". The only question then pending and not resolved by the District Court until June 29, 1972 was this very issue (9A). The District Court then cleared the trustees of "any breach of fiduciary duty" for having made the pension payment to Brauch. By that decision, after the Statute of Limitations had run out, the trustees were relieved of any personal liability for not having sought to effect restitution. The pension payment was not "uncollectible" by reason of the Statute of Limitations bar but, prior thereto, by its unenforceability as a legal claim. Consequently, there was no surviving obligation by Brauch to repay, or on the trustees to attempt collection.

Plaintiffs chide the trustees for standing "idly by" and allowing the Statute of Limitations to run against the Brauch claim. Since the claim was unenforceable, the trustees did not proceed for restitution. If plaintiffs were otherwise persuaded, they had the right, if not the obligation, to pursue the claim on behalf of their principals, the member-beneficiaries of the NMU. This they failed to do either initially or within the available time span before the statute ran out.

1—The Court of Appeals correctly decided that the trustees, including Karchmer, were free of wilful misconduct by forgoing restitution proceeding upon the legally unenforceable claim for the 1966 Brauch pension payment.

A trustee acting honestly and with ordinary prudence should not be held liable "for unfortunate results which he could not be expected to foresee . . ." *Ormiston* v. *Olcott,* 84 N.Y. 339, 347. Necessarily, the trustees in making the Brauch payment in 1966 could not be expected to forecast the outcome of litigation commenced only in 1969 and resulting in an adverse decision in 1972.

Further underscoring the uncollectibility of the claim, is the decision of the New York Court of Appeals in *Stark* v. *National City Bank of New York,* 278 N. Y. 388, 400, 16 N. E. 376, 381:

> "In all jurisdictions third parties are held responsible for the loss caused to an estate by transactions with a fiduciary in which they participated with actual knowledge that the fiduciary was committing a breach of trust".

No such foreknowledge is even imputed by plaintiffs either to the trustees or to Brauch.

As the District Court held, and the Court of Appeals affirmed, personal liability of the trustees depended on proof which the plaintiffs failed to provide. It was not even asserted, much less proven, that these payments were made without due care, prudence or diligence or that the trustees could have anticipated their invalidity to be judicially determined years later.

The good faith of the trustees was unquestioned even by plaintiffs on these payments. They met the standards re-

quired of ordinary prudent men unequipped with clairvoyance or the benefits of hindsight. Having met this standard, no breach of trust could be or was found against them for what, in retrospect, was a payment made in good faith reliance on the validity of the 1961 and 1964 amendments, unchallenged until 1969.

A personal judgment against Brauch was an indispensable predicate for imposing a duty upon the trustees to seek restitution thereon—as in the case of Perry. The ignored guidepost available to plaintiffs is set forth by Rule 19 of the F. R. Civ. P. It is self-evident that Brauch was a necessary and possibly indispensable party to the extent of requiring that he be thereby subjected to a personal judgment by a joinder as a defendant.

The general mandate of the Rule is to do equity to the extent possible to all persons concerned. The decision of the Supreme Court in *Provident Tradesmen's Bank & Trust Co.* v. *Patterson* (1968), 390 U.S. 102, 109, 88 S. Ct. 733, 738, 10 L. ed. 2d 936, dealt specifically with the effect of non-joinder of an "outsider" in the position of Brauch —even if not an indispensable and necessary party:

> "Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res adjudicata* as to, or legally enforceable against a nonparty."
>
> ". . . When a case has reached the appeal stage the matter is more complex. The judgment appealed from may not in fact affect the interest of any outsider even though there existed, before trial, a possibility that a judgment affecting his interest would be rendered. When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party who, of course, had no opportunity to plead and prove his interest below."

In this instance the District Court, as affirmed by the Court of Appeals, protected the interest of Brauch to the degree of not holding him personally liable even though not joined—in that the plaintiffs failed to establish that the pension payment was either made or received in bad faith under the prevailing state of facts in 1966.

Had plaintiffs joined Brauch as a defendant, this decision of non-liability might have been appealable. But plaintiffs elected not to do so and defendants were not so obliged. This foreclosed the plaintiffs from appealing the non-issue. As the Supreme Court further noted in *Provident Tradesmen's Bank and Trust Co.* (*supra*):

> "Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of a nonjoined person will be 'adequate', to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself both chose the forum and the parties defendant will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent."

The circumstance that the defendants did not raise below the absence of Brauch and other similarly affected parties as a basis for dismissal is now academic. As held in *Continental Ins. Co.* v. *Cotten* (CA 9th, 1970), 427 F2d 48, however effective a defense of indispensable parties may be at the trial level, it will almost always be too late at the appellate level to cure a defect of parties.

Plaintiffs did not seek specific relief against any of the parties other than Perry for wrongful receipt of pension payments. However, they were obliged to but did not comply with Rule 19(c) of F.R. Civ. P. to provide notice of po-

tential liability to Brauch and others similarly situated. This required plaintiffs to "state the names, if known to the pleader, of any persons as described in subdivisions (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined." Certainly, Brauch and the other non-entitled recipients had an interest in the outcome of the litigation, evident, as here, by plaintiffs' belated attempt to impose collateral liability on the trustees for failure to proceed against Brauch to judgment.

We do not contend that Brauch was an indispensable party in that his absence from the litigation could prevent the court from proceeding to a decree, and do complete and final justice, without affecting other persons not before the court. (*Shields* v. *Barron* (1854), 17 How 130, 15 L. ed. 158). For this is precisely the result achieved by the District Judge in effecting repayment by the trustees to the NMU of $624,222.60, representing contributions for non-eligible participants, held improperly made and received, together with a judgment against Perry, coupled with other corrective relief.

In this case, however, the trust question at issue involving the Brauch payment was whether the plaintiffs could prove by a preponderance of evidence that such payment by the trustees was an act of wilful misconduct and its recipient a knowing wrongdoer. The joinder or non-joinder of Brauch aside, neither condition was proved nor even attempted at trial. All that plaintiffs claim, in effect, is that because the 1961 amendment, under which the good faith payment and receipt occurred, was judicially declared invalid almost six years after the event, a liability automatically evolved upon the trustees regardless of the absence of wilful misconduct.

The District Court reached "a viable judgment having separable affirmative consequences with respect to parties before the court" as was the situation in *Stevens* v. *Loomis* (CA 1st 1964), 8 FR Serv 2d 19b.322 (Case I). There the

First Circuit held the inquiry on appeal to be "concerned solely with the inequities in the light of the total circumstances, resulting from the inability to affect absent interested parties", which parties were therefor defined as "merely necessary, not indispensable."

Plaintiffs, at best, would invite a multiplicity of suits by their neglect of Rule 19. The obvious consequence of holding the trustees chargeable for not seeking restitution of the Brauch payment would open the question of similar accountability for other good faith pension payments to many innocent but subsequently ruled non-eligible recipients.

A complete and final decree was reached on the merits on all questions properly at issue and so determined by the District Judge. The trustee Karchmer was absolved of personal liability on all issues before the court, by plaintiffs' failure to establish his wilful misconduct in any regard. Such determination was just and proper and should be left undisturbed by plaintiffs' belated efforts to cover up their own neglect or belated after-thoughts as to what might or should have been.

CONCLUSION

The Cross-Petition against Leon Karchmer should be denied.

Respectfully submitted,

HERMAN E. COOPER
Attorney for Respondent
Leon Karchmer